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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. .... Original.

THE STATE OF OHIO,
Complainant,

vs.

GUY T. HELVERING, AS AN INDIVIDUAL AND AS COMMISSIONER OF INTERNAL REVENUE, AND THOMAS J. CONNOR, CARL E. MOORE, HARRY F. BUSEY, AND CHARLES H. GRAVES, AS INDIVIDUALS AND AS UNITED STATES COLLECTORS OF INTERNAL REVENUE IN THE STATE OF OHIO,
Defendants.

SUPPLEMENTARY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.

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Defendants.

SUPPLEMENTARY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.

PRELIMINARY STATEMENT.

This court having ordered a rule to issue on the question of granting leave to file bill of complaint in the above

entitled case, directing the defendants to show cause why leave should not be granted, the state of Ohio, by its attorney general, respectfully submits this, the state's supplementary brief, in order that there might be before the court certain points upon which complainant relies in seeking to invoke the original jurisdiction of this court, and which are inextricably interwoven with and necessary to a full consideration of complainant's said motion.

Pursuant to the ratification by the states of the twenty-first amendment to the Constitution of the United States, the state of Ohio found it necessary, in the exercise of its police power and to prohibit the return of the private liquor dealer, the return of the saloon, and to promote temperance, to establish a new department of the state government, known as the department of liquor control, by the enactment of a law, being House Bill No. 1, set forth in Appendix A of complainant's bill of complaint heretofore lodged with the clerk, which should be here summarized:

The General Assembly of Ohio in the enactment of House Bill No. 1 stated in the title of the act that it was the purpose of the Legislature to provide a system for the control of the manufacture, sale and distribution of beer and intoxicating liquor in this state, including a state monopoly for the manufacture, distribution and sale of spirituous liquor, which in the act is defined to include any and all intoxicating liquors which contain more than seventeen per centum of alcohol by volume.

To accomplish the purpose set forth in the title of the

act, the Legislature created a department of liquor control which consists of a board of liquor control of four members and a director of the department. The members of the board of liquor control and the director are appointed by the governor with the advice and consent of the senate of the state of Ohio. (Section 2.)

The principal duties and powers of the board of liquor control are to formulate the policies of the department and to act as a board of review in respect to the rejection, suspension and revocation of permits ordered by the director of the department of liquor control. (Section 3.)

The members of the board of liquor control and the director of the department are required to devote their entire time to the duties of their office and are not permitted to have any financial interest in the manufacture, distribution or sale of beer or intoxicating liquors. (Section 5.)

Each member of the board of liquor control and the director of the department of liquor control is required to give bond to the state and to take an oath of office before entering upon the duties of his office. (Section 6.)

The salaries to be received by the members of the board of liquor control and the director are fixed by the Legislature. (Section 5.)

The director of liquor control is the executive secretary of the board of liquor control and is also empowered to exercise all the powers and duties vested in or imposed upon the department of liquor control, except those vested in the board of liquor control. (Section 7.)

The department of liquor control is authorized to employ, subject to the civil service laws of the state of Ohio, such employes as are necessary to perform and to carry out the functions of the department of liquor control. The department of liquor control is required to establish, manage and control a system of state owned liquor stores for the sale of spirituous liquor by the package or container at retail and to holders of permits issued by the department of liquor control who are authorized to sell spirituous liquor by the drink for consumption on the premises where sold. The state in the establishment and maintenance of such state owned liquor stores, has retained a state monopoly in respect to the manufacture, sale and distribution of spirituous liquor by the package or container. (Section 8.)

The department of liquor control is required to establish at least one state owned liquor store in each county of the state. (Section 11.)

No one but the department is permitted to sell spirituous liquor by the package or container either at wholesale or retail for consumption off the premises, except druggists who are licensed by permit to sell spirituous liquor and alcohol on the prescription of physicians.

All moneys received from the sale of spirituous liquor are paid to the treasurer of the state. (Section 9.)

All persons authorized to dispense spirituous liquor by the drink for consumption on the premises where sold must purchase such spirituous liquor from the state. (Section 19.)

It is a criminal offense for a person, authorized by the

department of liquor control to dispense spirituous liquor by the drink for consumption on the premises where sold, to dispense or to have in his possession for sale spirituous liquor which is not purchased from the department of liquor control. (Section 54.)

Section 30 of the act provides that neither the department, the members of the board nor the director shall be personally liable in any action at law for damages sustained by any person because of any acts performed or done by the department, the board, the director or any employe of the department in the performance of his duties and in the administration of the act.

The attempt of the defendants to assess and collect a tax against the state of Ohio in the exercise of this governmental function, as set forth in said bill of complaint, has created such extraordinary and exceptional circumstances as to leave the state without adequate remedy except by invoking the original jurisdiction of this court in equity.

ARGUMENT.

SUMMARY OF ARGUMENT.

Point I.

The instant case is one in which the state of Ohio has the legal right to invoke the original jurisdiction of this court in injunction.

A. This is an action arising from extraordinary and exceptional circumstances.

Point II.

Defendants have no authority to assess and collect a tax against the means by which the state performs its governmental functions, and hence this is not an action against the United States.

A. In the operation of complainant's department of liquor control, the state is performing a purely governmental function.

B. The federal statutes do not levy a tax against a state which sells and distributes intoxicating liquor.

C. It follows that this is not an action against the United States.

Point III.

The consequences of defendants' attempt to assess and collect a tax against the state, to the operations of the state government.

Point IV.

The case of South Carolina v. United States (199 U. S., 437) is not inconsistent with complainant's position.

POINT I.

THE INSTANT CASE IS ONE IN WHICH THE STATE OF OHIO HAS THE LEGAL RIGHT TO INVOKE THE ORIGINAL JURISDICTION OF THIS COURT IN INJUNCTION.

The right of a state to institute an original action against a citizen or citizens of another state in this court is granted in Article III, Section 2, of the Constitution of the United States.

The right of a state to prosecute a suit in injunction has been recognized by this court.

> **State of Georgia v. Tennessee Copper Co.**, 206 U. S., 230, 51 L. Ed., 1038;
> **State of Florida v. Mellon**, 273 U. S., 12, 71 L. Ed., 511.

A. This is an Action Arising From Extraordinary and Exceptional Circumstances.

There is no question but that ordinarily injunction will not lie to restrain the collection of a federal tax. As stated by Mr. Justice Brewer in the case of **Pacific Whaling Co. v. United States**, 187 U. S., 447, 452 (47 L. Ed., 253):

> "Indeed, in respect to internal revenue taxes, Section 3224, R. S., specifically provides: 'No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' **Something more than mere illegality is necessary to**

justify the interference of a court of equity." (Boldface ours.)

In the case of **Regal Drug Corporation v. Wardell**, 260 U. S., 386, 67 L. Ed., 318, the court had before it an action in which the remedy sought was "by injunction against the collector of internal revenue to restrain him from taking or continuing in possession of its store and its property, or from conducting any action or proceeding to enforce the collection of taxes, assessments or penalties." In that case, the question was as to the validity of a tax levied on the plaintiff's wines, which assessment the plaintiff contended was a fine or penalty rather than additional tax. The Circuit Court of Appeals dismissed the case on the ground that R. S. Section 3224 (Comp. Stat., Section 5947) forbade the prosecution of the injunction, yet this court held that the Circuit Court of Appeals erred in so doing.

If an Individual May Enjoin the Collection of a Federal Tax in the District Court Under Certain Circumstances, a State May Enjoin Such Collection Under Like Circumstances in This Court.

The case of **Hill v. Wallace**, 259 U. S., 44, 66 L. Ed., 822, is authority for the contention that under exceptional and extraordinary circumstances, where a multiplicity of suits would otherwise result, equity may be invoked to restrain the attempted collection of an unauthorized federal tax. It is pertinent to note that that action in injunction was instituted against the secretary of agri-

culture, the commissioner of internal revenue, et al., in the United States District Court, the complainant being an individual citizen, as distinguished from the instant case, where the complainant is one of the states of the United States.

Following Hill v. Wallace, supra, and to the same effect, is the more recent case of **Miller v. Standard Nut Margerine Co.**, 284 U. S., 498, 76 L. Ed., 422, in which an individual instituted an action in the District Court of the United States for the Southern District of Florida to enjoin the collection of a federal oleomargerine tax. The language of this court at pages 509 and 510 is as follows:

> "Independently of, and in cases arising prior to, the enactment of the provision (Act of March 2, 1867, 14 Stat. at L. 475, Chap. 169) which became Rev. Stat. § 3224, this court in harmony with the rule generally followed in courts of equity held that a suit will not lie to restrain the collection of a tax upon the sole ground of its illegality. The principal reason is that, as courts are without authority to apportion or equalize taxes or to make assessments, such suits would enable those liable for taxes in some amount to delay payment or possibly to escape their lawful burden and so to interfere with and thwart the collection of revenues for the support of the government. And this court likewise recognizes the rule that, in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector. Dows v. Chicago, 11 Wall., 108; Hannewinkle v. Georgetown, 15 Wall., 547; State R. Tax Cases, 92 U. S., 575, 614.

Section 3224 is declaratory of the principle first mentioned and is to be construed as near as may be in harmony with it and the reasons upon which it rests. Cumberland Teleph. & Teleg. Co. v. Kelly, 160 Fed., 316, 321; Baker v. Baker, 13 Cal., 87, 95; Bradley v. People, 8 Colo., 599, 604, 9 Pac., 783; 2 Lewis' Sutherland, Stat. Constr., 2d Ed., § 454. The section does not refer specifically to the rule applicable to cases involving exceptional circumstances. The general words employed are not sufficient, and it would require specific language undoubtedly disclosing that purpose, to warrant the inference that Congress intended to abrogate that salutary and well established rule. This court has given effect to § 3224 in a number of cases. Snyder v. Marks, 109 U. S., 189, 191; Dodge v. Osborn, 240 U. S., 118, 121; Dodge v. Brady, 240 U. S., 122. It has never held the rule to be absolute, but has repeatedly indicated that extraordinary and exceptional circumstances render its provisions inapplicable. Hill v. Wallace, 259 U. S., 44, 62; Dodge v. Osborn, supra; Dodge v. Brady, supra. Cf. Graham v. DuPont, 262 U. S., 234, 257; Brushaber v. Union P. R. Co., 240 U. S., 1.

This is not a case in which the injunction is sought upon the mere ground of illegality because of error in the amount of the tax. The article is not covered by the act." '

It is submitted that if under extraordinary and exceptional circumstances an individual may institute an action to enjoin the collection of a federal tax in a District Court, then by virtue of Article III, Section 2 of the Constitution of the United States, one of the sovereign states may institute such an action under similar circumstances in this court. In addition, judicial relief may be granted

to a state under circumstances which would not justify relief if the suit were between private parties.

Georgia v. Tennessee Copper Co., 206 U. S., 230, 51 L. Ed., 1038.

The extraordinary and exceptional circumstances surrounding the instant case are set forth in the bill of complaint in Paragraph 11, appearing on pages 12 and 13, and need not be reiterated here. In addition to these allegations contained in the bill, it is contended that the situation with respect to the liquor traffic, as a result of the ratification of the Twenty-first Amendment to the Constitution of the United States, is in itself extraordinary and exceptional, in that this traffic has within the past fifteen years been the subject of two amendments to the Federal Constitution and amendments to the constitutions of almost every state in the Union. No other subject matter has occasioned two amendments to the Federal Constitution in the history of the nation.

POINT II.

DEFENDANTS HAVE NO AUTHORITY TO ASSESS AND COLLECT A TAX AGAINST THE MEANS BY WHICH THE STATE PERFORMS ITS GOVERNMENTAL FUNCTIONS, AND HENCE THIS IS NOT AN ACTION AGAINST THE UNITED STATES.

The reciprocal immunity from taxation existing between the United States and the several states in the performance of their respective governmental functions has been established and recognized by this court in innumerable decisions beginning with the case of **McCullough v. Maryland,** 4 Wheaton, 316, and ending with the case of **Trinityfarm Const. Co. v. Grosjean** of the present term decided March 5, 1934. It is unnecessary to cite the innumerable authorities on this point.

A. In the Operation of Complainant's Department of Liquor Control, the State is Performing a Purely Governmental Function.

The state's operation of its department of liquor control constitutes an exercise of its police power.

Long before the adoption of the Eighteenth Amendment of the Constitution of the United States, it was recognized by this court, and by the courts of last resort of the several states, that the authority to regulate, con-

trol or prohibit trafficking in intoxicating liquors lies in the police power of the states. It is unnecessary to cite even a small portion of the innumerable decisions upholding this principle. It is sufficient to mention a few of the decisions of this court:

Eberle v. Michigan, 232 U. S., 700, 34 S. Ct., 464, 58 L. Ed., 803;
Purity Extract, etc., Co. v. Lynch, 226 U. S., 192, 33 S. Ct., 44, 57 L. Ed., 184;
Lawton v. Steele, 152 U. S., 133, 14 S. Ct., 499, 38 L. Ed., 385;
Mugler v. Kansas, 123 U. S., 623, 8 S. Ct., 273, 31 L. Ed., 205;
Bartmeyer v. Iowa, 18 Wall., 129, 21 L. Ed., 929;
License Cases, 5 How., 504, 12 L. Ed., 256.

The state of Ohio has, of course, long adhered to this doctrine.

The State v. Hipp, 38 O. S., 199;
Bloomfield v. State, 86 O. S., 253.

In his work on Constitutional Limitations, 8th Ed., Judge Cooley, in Volume II thereof, under Chapter 16, entitled "The Police Power of the States", includes a full discussion of "Restraints on Sale of Liquors", beginning at page 1250.

Police power has been variously defined by innumerable courts and text writers. It is defined in Cooley's Constitutional Limitations, 8th Ed., Volume II, page 1223, as follows:

> "The police of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public

> order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others."

This same author at page 1226 quotes the language of the Supreme Court of Ohio in **Leonard v. State**, 100 O. S., 456, 127 N. E., 464, as follows:

> "The dimensions of the government's police power are identical with the dimensions of the government's duty to protect and promote the public welfare. The measure of police power must square with the measure of public necessity. The public need is the polestar of the enactment, interpretation, and application of the law."

It is difficult to conceive of a function at the present time more directly designed for the protection of the public health, safety, welfare and morals than the control of the liquor traffic, and hence more directly and exclusively a pure governmental function. In its nature it goes to the very essence of government, that of promoting the general welfare. The preamble to the Constitution of the United States of 1787 states the purpose of that Constitution, among other things, to "promote the general welfare". Could it be said that a federal activity admittedly for that purpose was not an activity purely governmental in its nature? The preamble of the Ohio Constitution likewise sets forth that it is the purpose of the Constitution to promote the "common wel-

fare". Obviously a function of the state government for that purpose must be governmental in its nature.

Among a number of cases recognizing the governmental character of functions controlling the liquor problem, attention is directed to the case of **Plumb v. Christie**, 103 Ga., 686, 30 S. E., 759, the fourth branch of the syllabus by the court reading as follows:

> "The General Assembly of this state, by virtue of its police powers, has the authority to regulate and control the sale of all intoxicating liquors, and can establish dispensaries for an exclusive sale of such liquors, under the management of agents or officials created for this purpose."

The following language of the court at page 695 is particularly pertinent to the instant case:

> "It is further urged that the Legislature has no right to authorize a municipality to so embark into a commercial business for profit and gain. **It is manifest that the primary object of this dispensary act was not for the purpose of gain, and embarking a municipality in a commercial enterprise, but that the end and purpose had in view was a regulation of the sale of an injurious and dangerous beverage, in the interest of temperance, and for the purpose of throwing a safeguard around the morals of the people.** The revenue derived from this source was merely one of its incidental features. We do not mean to say, however, that the Legislature has not the power to confer upon a municipality a right to conduct such a business purely as a matter looking to an increase in its revenue from the profits that might accrue. Our attention has been called to no provision in the Constitution, either expressly or by fair implication, denying to the Legislature the right to clothe a municipality with such a privilege. Nor

> do we mean to say that the Legislature has the right to create a monopoly of any one of the ordinary callings of life which one has a right to pursue, so long as its pursuit does not involve evil or danger to society; but when the state bestows a privilege which is not a common, natural right, such as the right to engage in the liquor traffic, it may create a monopoly, and yet no right of the individual be violated. It has often been held that monopolies may be created, even in such business as may fall within the ordinary callings of life, where an indiscriminate conduct thereof by individuals under certain cirsumstances and in certain places might be injurious to the common welfare. These principles are fully discussed in Tiedman's Limitations of Police Power (Section 105). On pages 323, 324, and 325 of that work are cited a number of cases sustaining these views, and others in apparent conflict. The author himself adopts the doctrine laid down by the Supreme Court of the United States in the Slaughter House Cases." (Boldface ours.)

Again, in the case of **Dispensary Comrs. v. Thornton**, 106 Ga., 106, 31 S. E., 733, the syllabus by the court is as follows:

> "The dispensary commissioners appointed under the local dispensary act for Terrell county, approved December 10, 1897 (Acts 1897, p. 562), are governmental officials, and not liquor dealers, within the meaning of the tax act of 1896."

It is submitted that when a state in the exercise of its police power, for the purpose of controlling the liquor traffic, prohibits the private business of wholesaling, and retailing by the package, of spirituous liquor, and itself takes over that function for the protection of its citizens from, on the one hand the unscrupulous liquor dealer, and

on the other hand the bootlegger, that state is performing a most vital governmental function. This, complainant contends, has always been true, but it is now doubly true in view of America's experience during the last fifteen years

The adoption of the Eighteenth Amendment, followed by the adoption of the Twenty-first Amendment, has indisputably placed complainant's operation of its department of liquor control in the category of a governmental function.

The functions of government which are governmental in their nature are not fixed and static things. They are changing as conditions change, and as the experience of the people demonstrates the necessity for change. The long line of decisions of this court with respect to the police power of the state or nation supports this statement. While it might possibly have been contended prior to the adoption of the Eighteenth Amendment, in recognition of the theretofore existing fact, that the liquor business was a business ordinarily conducted by individuals, such contention may no longer be made, for the reason that **as a result of the liquor business having been conducted by individuals the nation adopted the Eighteenth Amendment and prohibited its conduct.**

The abuses arising from the attempted abolition of this business in its entirety resulted in the adoption of the Twenty-first Amendment, returning the problem to the states.

This court is therefore here confronted with a question involving a traffic in which individuals have not for

years been engaged,—a traffic which the state of Ohio, for the protection of its citizens from abuses of the private liquor dealer and the bootlegger, has seen fit in the exercise of its police power to take over as a purely governmental function. **The state has not seen fit to return this traffic to the individual. To that extent, Ohio still has prohibition.**

The function of the state in controlling the liquor traffic, as a result of the fundamental changes during the past fifteen years, is in an entirely different category than ever before. It is necessary to further comment upon these changes. We quote from the report submitted to the president of the United States January 15, 1931, by George W. Wickersham, chairman of the national commission on law observance and enforcement, on the enforcement of the prohibition laws of the United States, commonly referred to as the "Wickersham Report", at page 5:

> "On April 4, 1917, a joint resolution was introduced in the senate, proposing an amendment to the Constitution prohibiting the manufacture, the sale or transportation of intoxicating liquors within, the importation thereof into, and the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes. In the course of the debate over this resolution, reference was made to the fact that twenty-six states had enacted state prohibition laws, that more than 60 per cent of our people and 80 per cent of the territory of the United States at that time were living under prohibition."

The development of conditions, the recurrence of which the state of Ohio in the exercise of its governmental functions seeks to preclude, is clearly set forth in this same report on page 6 in the following language:

> "Two features of the history of liquor control in the United States are of special importance for our present purpose, namely, the effect of industrial organization and consequent methods of manufacture and sale upon production and consumption of liquor and the effect of this and of organizations of producers upon politics. Much of the failure of the system of liquor control devised in nineteenth century America was due to their presupposing an economic situation which was ceasing to exist. For example, the high license system sought to insure responsible local sellers of good character and standing who might reasonably be expected to conform to the regulations imposed by local opinion and expressed in local laws. But the days of the old independent local tavern keeper were gone. The business of brewing and that of distilling came to be organized. **The local brewer and local distiller supplying a limited local trade gave way to great corporations, organized on modern lines, each prepared to do a huge business and seeking to expand by finding new markets and increasing their business in old markets.** Competition between these corporations was keen. Methods of production and distribution were improved continually. Sales organization was developed. **More and more the local seller ceased to be independent and became a mere creature of some producer.** Thus there was every pressure upon the seller to sell as much as possible and to as many as possible. Legislation preventing such corporations from holding licenses was not hard to evade and ran counter to the settled economic current. **Commercialized production and distribution, under the economic order of the twentieth century, became a great evil.**

> No less an evil grew up through the political activities and influence of organizations of producers, working through their local dependents. The corrupting influence upon legislation and upon administration and police in our large cities was conspicuous and growing. The steady progress of state prohibition and local option was largely coincident with the growing power of these organizations and due to public resentment thereat." (Boldface ours.)

These evils gave the entire nation prohibition; they were largely the cause of the Eighteenth Amendment. It is a return of these abuses of the private liquor dealer, which the state has precluded by its state monopoly. **In so far as the individual wholesaling and retailing by the package of spirituous liquor is concerned, Ohio still has prohibition.** The state of Ohio has not taken over the function of dispensing intoxicating liquor by the glass, but the state has, in order to combat the basic evil giving rise to prohibition, seen fit to monopolize what was once a private and highly competitive system of distribution of spirituous liquor.

Had the Eighteenth Amendment been modified in accordance with the suggestion contained in the separate report of Henry W. Anderson of the Wickersham Commission, pages 89 to 109 of that report, supra, resulting in federal control, and monopoly, we submit that the performance of such a function by the federal government would have been purely governmental and exempt from state taxation. The same must be true here in the case of the state, in view of the Twenty-first Amendment.

If it might be contended that prior to the adoption of

the Eighteenth Amendment the commercialized distribution of spirituous liquor was a proprietary function, as distinguished from a governmental function, because until then it had always been a private business, but such a contention is obviously now untenable because this traffic which the state has monopolized has been abolished for more than fourteen years. **It is submitted that there is no function which complainant in this case might exercise at the present time which is so entirely governmental in its nature as the function here sought to be interfered with, burdened and curtailed by defendants.**

B. The Federal Statutes do Not Levy a Tax Against a State Which Sells and Distributes Intoxicating Liquor.

The commissioner of internal revenue and the internal revenue collectors in the four internal revenue districts in Ohio are statutory officers. The source and measure of the authority of those officers can emanate only from the acts of Congress which specify the objects to be taxed and which direct the assessment and collection of the same and which define the duties of such officers in respect to the assessment and collection of such taxes. These officers cannot on their own volition impose a tax on any property or occupation. Their authority for so doing must be conferred upon them by the provision of some act of Congress, which, in the instant case, is claimed by the defendants to be conferred by 26 U. S. C. A., Section 11 (Revised Statute 3140); 26 U. S. C. A.,

Section 181 (Revised Statute 3232); 26 U. S. C. A., Section 193 (Revised Statute 3281); and 26 U. S. C. A., Section 205 (Revised Statute 3244). Those statutes express in clear terms an intent on the part of Congress to impose a special tax on the occupation and business of selling intoxicating liquor at wholesale or retail. The words "state" and "person" are defined in 26 U. S. C. A., Section 11 (Revised Statute 3140), as follows:

> "The word 'State,' when used in this title, shall be construed to include the Territories and the District of Columbia, where such construction is necessary to carry out its provisions. And where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word 'person,' as used in this title, shall be construed to mean and include a partnership association, company or corporation, as well as a natural person."

The definition of the word "person" given in the section just quoted clearly shows that Congress did not intend to include a state within the provisions of Chapters 2 and 4 of Title 26 U. S. C. A., which, among other things, relate to the levy and collection of a special excise tax upon the business or occupation of dealing in intoxicating liquor at wholesale or retail. If it was intended by Congress to include a state in the term "person", as defined in 26 U. S. C. A., Section 11 (Revised Statute 3140), and used in Chapters 2 and 4 of Title 26 U. S. C. A., it could have been done by expressly so providing without the necessity of being read into the section by a court. In other words, if the conducting of state liquor stores by a state was to be subject to the special occupational tax

imposed by 26 U. S. C. A., Section 205 (Revised Statute 3244), it is certain that such tax would have been provided for in language which would have left no doubt as to the intention of Congress. It must be borne in mind that at the time 26 U. S. C. A., Section 11 (Revised Statute 3140), was enacted there was no state in the Union engaged in the retailing or wholesaling of spirituous liquor. At that time the only persons who were allowed to sell or who did sell or engage in the business of selling intoxicating liquor were natural persons or private corporations. And in most instances, the states and the federal government required such persons and corporations to take out licenses to engage in such business. A monopoly by a state in respect to the sale and distribution of intoxicating liquor was not at that time known. Thus, the word "person" could not have been used by Congress in the statutes cited to mean or include a state, its officers or employes. It is a well settled rule of statutory construction in construing a statute that words are to be taken in their ordinary sense unless from the whole context a different meaning was intended. Giving to the term "person" its broad and commonly understood meaning, it follows that 26 U. S. C. A., Section 11 (Revised Statute 3140), deals with individuals, associations, co-partnerships and corporations, since a state is not a person within the ordinary or legal definition of that word.

Mr. Justice Field in **United States v. Fox**, 94 U. S., 315, at page 321, said that:

> "The term 'person' as here used applies to natural persons, and also to artificial persons — bodies

politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the federal government. It would require an express definition to that effect to give it a sense thus extended. And the term 'corporation' in the statute applies only to such corporations as are created under the laws of the State."

Likewise, **In the Matter of Will of Fox**, 52 N. Y., 530, at 535, it was said that:

> "The word 'person', when used in a statute, will, unless the meaning is restricted by the context, be deemed to include corporations. They are artificial persons; bodies politic, possessing some of the attributes of natural persons, and are subject to many of the obligations and duties imposed by law upon individuals. * * * But no authority has been referred to showing that the word person, when used in a statute, may, without further definition, be held to embrace a state or nation."

In the case of **Lowenstein v. Evans**, 69 Fed., 908, the first branch of the headnote is as follows:

> "The act of July 2, 1890 (26 Stat., 209, c. 647), to protect trade and commerce against unlawful restraints and monopolies, is not applicable to the case of a state which, by its laws, assumes an entire monopoly of the traffic in intoxicating liquors (Act S. C. Jan. 2, 1895). A state is neither a 'person' nor a 'corporation' within the meaning of the act of Congress."

See, also:

McBride v. Board of Commissioners of Pierce County, 44 Fed., 17, 18;
Berton v. All Persons—Calif., 170 Pac., 151.

It is also to be noted that Congress did not include within the definition of the word "person", as contained in 26 U. S. C. A., Section 11 (Revised Statutes, 3140), the phrase "body corporate or politic". Even if that phrase had been used, it would not include a state.

Des Moines County v. Harker, 34 Ia., 84;
Lowenstein v. Evans, 69 Fed., 908, 911.

It also must be borne in mind that a state accurately speaking is not a corporation, since the state is self-existing, whereas a corporation is an entity created by a state. Such general terms as "person" and "corporation" appear in the statutes cited in reference to natural and artificial beings and in no instance does the language contained in those statutes require, or by implication make it necessary, that a different or more inclusive meaning be given to those terms. Those general terms, as defined by Congress, were not intended to embrace a state. Furthermore, there is nothing in the pertinent federal statutes which, either in express terms or by necessary implication, indicates that it was the purpose of Congress to impose an excise tax upon the activities of a state engaged in distributing intoxicating liquor by it in a governmental or proprietary capacity. The failure of Congress to include the states in the definition of the term "person" could not have been inadvertent since the states are not commonly thought of as persons. As stated by Woods, circuit judge, in **Davis v. Pringle**, 1 Fed. (2d Ed.), 860, at page 863:

> "If it had been intended that 'person' should have such a comprehensive and unusual meaning as to

include them (states), the framers of the definition would have said so." (Insertion ours.)

It was stated in the case of **Mayrehofer v. Board of Education**, 89 Calif., 110, 26 Pac., 646, that the reason a state is not bound by general words in a statute is because it "would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its function, or to establish a right of action against it."

The Legislature of the state of Ohio, by the enactment of House Bill No. 1, has declared that the sale of liquor by the state of Ohio is essential and necessary for the preservation of the public welfare, safety and well-being. (See Sec. 68 of the Ohio Act, pp. 71, 72 of Complainant's Bill of Complaint.) It would grievously retard, impede and burden the sovereign right of the state to execute its sovereign power, to subject it to laws that were intended by Congress for persons and artificial entities other than states. If the defendants have the power under the statutes cited to interfere with the operations of the state of Ohio by compelling compliance on its part with the special excise laws in question, then the potential existence of the sovereignty of the state of Ohio is at the mercy of the federal government. Certainly in the absence of express words by Congress requiring it, this court should not hold that it was intended by Congress to subject a sovereign state to the payment of the special excise taxes complained of.

It also must be borne in mind that if the taxes to be collected must be paid, the same will be paid either out

of the treasury of the state of Ohio or by its employes. In either event, a state or the instrumentality of a state would be subjected to a federal tax.

Even if it could be said that the rule of reciprocal immunity from taxation is not applicable to the activity of a state which engages in the sale and distribution of liquor at retail and that Congress has the power to tax a state while engaged in that function, nevertheless that activity cannot be taxed until Congress speaks. That power, if it exists, has not been exercised by Congress. The acts of Congress involved in this suit contain no language imposing the special excise taxes complained about on a state, and there is no language which implies that Congress intended to tax a state. Consequently, the demand of the defendants for the payment of such taxes from the state of Ohio in the operation of its state liquor stores is without authority in law and clearly illegal.

C. It Follows That This is Not an Action Against the United States.

In view of the fact that defendants have no authority to assess and collect a tax against the state of Ohio, it necessarily follows that this is an action to enjoin defendants from committing acts under color of office which are neither authorized by the statutes of the United States nor by its Constitution. A similar situation was presented to this court in the case of **Philadelphia Co. v. Stimson, Secty. of War**, 223 U. S., 605, 56 L. Ed., 570, in which the plaintiff sought an **injunction** against such

secretary to restrain him from causing the arrest of the plaintiff for the violation of a mandate or order of such secretary, who purported to act under authority of the Act of Congress of March 3, 1899, Sections 11, 12 and 17. In that case it was contended that such suit was, in reality, one against the United States. This court in its opinion observed at page 620:

> "The complaint did not ask the court to interfere with the official discretion of the secretary of war, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; **it is not a suit against the United States.**" (Boldface ours.)

The same might be said of the suit at bar. The issue raised by the bill of complaint is that defendants have no authority to do the threatened acts.

It has been repeatedly held that the exemption of the United States from suit does not protect its officers from personal liability when they, under the color of their offices, illegally infringe upon the rights of others.

Little v. Barreme, 2 Cranch, 170, 2 L. Ed., 243;
United States v. Lee, 106 U. S., 196, 220, 221, 27 L. Ed., 171;
Belknap v. Schild, 161 U. S., 10, 40 L. Ed., 599;
Tindal v. Wesley, 167 U. S., 204, 42 L. Ed., 137;
Scranton v. Wheeler, 179 U. S., 141, 45 L. Ed., 126.

And such acts of federal officers may be enjoined.

Noble v. Union River Logging R. Co., 147 U. S., 165, 171, 172, 37 L. Ed., 123;
Payne v. Central Pac. Ry. Co., 255 U. S., 228, 65 L. Ed., 598;
American School v. McAnnulty, 187 U. S., 94, 47 L. Ed., 90;
Garfield v. U. S., ex rel. Goldsby, 211 U. S., 249, 261, 262, 53 L. Ed., 168;
Philadelphia Co. v. Stimson, 223 U. S., 605, 56 L. Ed. 570;
Work v. Louisiana, 269 U. S., 250, 70 L. Ed., 259;
Lane v. Watts, 234 U. S., 525, 540, 58 L. Ed., 1440.

POINT III.

THE CONSEQUENCES OF DEFENDANTS' ATTEMPT TO ASSESS AND COLLECT A TAX AGAINST THE STATE, TO THE OPERATIONS OF THE STATE GOVERNMENT.

The difficulties surrounding the application of the rule that the federal government is immune from state taxation in the operation of its governmental activities and the state government is likewise immune from federal taxation in the conduct of its governmental activities, are recognized. The effect in each given case must be given consideration. This court has very properly recognized its responsibility in deciding questions of this nature in preserving each government within its own sphere without undue interference by the other. As stated in

Educational Films Corp. v. Ward, 282 U. S., 391, 392, 75 L. Ed., 400:

> "This court, in drawing the line which defines the limits of the powers and immunities of state and national governments, is not intent upon a mechanical application of the rule that government instrumentalities are immune from taxation, regardless of the consequences to the operations of government. The necessity for marking those boundaries grows out of our constitutional system, under which both the federal and the state governments exercise their authority over one people within the territorial limits of the same state. The purpose is the preservation to each government, within its own sphere, of the freedom to carry on those affairs committed to it by the Constitution, without undue interference by the other."

More recently this court said in **University of Illinois v. United States**, 289 U. S., 48, 77 L. Ed., 1025:

> "The principle invoked by the petitioner, of the immunity of state instrumentalities from federal taxation, has its inherent limitations. Fox Film Corp. v. Doyal, 286 U. S., 123, 128. It is a principle implied from the necessity of maintaining our dual system of government. Collector v. Day (Buffington v. Day), 11 Wall., 113, 127; Willcuts v. Bunn, 282 U. S., 216, 225; Indian Motocycle Co. v. United States, 283 U. S., 570, 575. Springing from that necessity it does not extend beyond it. Protecting the functions of government in its proper province, the implication ceases when the boundary of that province is reached."

It is submitted that there is no question but that the operation of complainant's department of liquor control is a function of the state's government in its proper prov-

ince, and hence it becomes necessary to consider whether or not the imposition of federal taxation upon this instrumentality of the state constitutes a deprivation of the protection guaranteed by the federal Constitution. The taxation of this instrumentality which the state is exercising under its police power would authorize the destruction of that police power. Instead of destroying police regulations, this court has consistently upheld them.

Noble State Bank v. Haskell, 219 U. S., 104, 55 L. Ed., 112;
Mugler v. Kansas, 123 U. S., 623, 31 L. Ed., 205.

The inevitable result and consequence of taxing this state instrumentality is to interfere therewith and destroy the same, thereby returning to the federal government the power to prohibit the business of wholesaling and retailing in packages spirituous liquor, a power expressly taken away from the federal government by the adoption of the Twenty-first Amendment of the Constitution of the United States.

The revenue of which the federal government would be deprived by a decision of this court supporting complainant's contentions would not be great in amount.

The exemption of the state from taxation in this case, however, is not dependent upon weight of burden or the extent of the resulting interference with sovereign independence. As stated by this court in **Trinityfarm Construction Co. v. Grosjean** of the present term decided March 5, 1934:

> "The appellant seeks reversal on the ground that the contracts are federal means or instrumentalities,

that the enactments referred to impose a direct burden upon them and that the state was without power to impose the tax. And on that basis it seeks to invoke the rule that, consistently with the federal Constitution, a state may not tax the operations of an instrument employed by the government of the Union to carry its powers into operation. That principle, while not expressly stated in the Constitution, necessarily arises out of our dual government. It has often been given effect. **And reciprocally it safeguards every state against federal tax on its governmental agencies or operations. Its application does not depend upon the amount of the exaction, the weight of the burden or the extent of the resulting interference with sovereign independence. Where it applies, the principle is an absolute one wholly unaffected by matters or distinctions of degree. Indian Motocycle Co. v. United States, 283 U. S., 570, 575, and cases cited.** Its right application is essential to the orderly conduct of the national and the state governments and the attainment of justice as between them." (Boldface ours.)

Pertinent to a consideration of the consequences of defendants' attempt to assess and collect the tax here under consideration, attention is directed to the case of **South Carolina v. United States**, 199 U. S., 437, hereinafter more fully commented upon, which case was referred to in the case of **Murray v. Wilson Distilling Co.**, 213 U. S., 173, 53 L. Ed., 742, wherein the court said:

"The decision of the questions arising upon this record, relating, as they do, to rights and remedies of a mere contract creditor of the state of South Carolina, is not in anywise controlled by the ruling in South Carolina v. United States, 199 U. S., 437, where, although recognizing that official dispensers of liquors under the laws of South Carolina were

agents of the state, it was held (p. 463), 'that the license taxes charged by the federal government upon persons selling liquor are not invalidated by the fact that they are agents of the state, which has itself engaged in that business.' **That case was concerned with the power of a state, by virtue of its legislation in regard to the sale and consumption of liquor, to destroy a pre-existing right of taxation possessed by the government of the United States.**" (Boldface ours.)

The court is not here concerned with the destruction by a state of a "pre-existing right of taxation possessed by the government of the United States",—this for the reason that the United States has not for the past fifteen years had any right to tax the liquor business here under consideration, it having been during that interval prohibited; furthermore, since the adoption of the Twenty-first Amendment of the Constitution of the United States any right to tax this business is dependent, in the first instance, upon the state permitting the business to be conducted therein. To the extent that a state, since the Twenty-first Amendment, authorizes a return of this business by private individuals, to that extent is the right of the federal government to tax the same conferred.

There is no question here of interference with or danger to the sources of federal revenue. The liquor traffic has become primarily a problem of welfare, health and morals; it is no longer a problem of revenue. Whatever revenue aspects the problem has have become purely secondary. True, the liquor traffic was heretofore de-

cidedly a matter of revenue and as a result of this the nation adopted prohibition. We quote on this point from the report of the Rockefeller Foundation on the liquor problem, entitled "Toward Liquor Control" at pages 18 and 19:

> "While many states will doubtless follow the license method in the control of beverages of higher alcoholic content, this method contains a fundamental flaw in that it retains the private profit motive which makes inevitable the stimulation of sales.
>
> Wide experience in many countries indicates that the best approach of the problem of heavier alcoholic beverages is through state control. By state control we mean specifically a system by which the state, through a central authority, maintains an exclusive monopoly of retail sale for off-premises consumption. This authority determines prices, fixes the location of its stores, controls advertising, and in general manages the trade in such a way as to meet a minimum, unstimulated demand within conditions established solely in the interests of society.
>
> **The primary objective of taxation should be social control, not revenue."** (Boldface ours.)

The inevitable result of viewing the question as a revenue problem must result in returning to actual, if not nominal, prohibition, with a return of the evils thereof. **This traffic in spirituous liquors ceased to be a revenue traffic upon the adoption of the Eighteenth Amendment, and the adoption of the Twenty-first Amendment did not return it to this category in states which adopt a state monopoly.** If the lawful liquor traffic is to be again viewed as a traffic for revenue by either state or nation, it must again revert to the bootlegger. Experience has removed it from this category.

POINT IV.

THE CASE OF SOUTH CAROLINA VS. UNITED STATES, (199 U. S., 437), IS NOT INCONSISTENT WITH COMPLAINANT'S POSITION.

In the case of **South Carolina v. The United States**, 199 U. S., 437, 50 L. Ed., 265, decided in 1905, the court laid down the following rules of law:

1. That which is implied is as much a part of the Constitution as that which is expressed therein, and among those matters which are implied is that the nation may not prevent the state from exercising its ordinary function of government.

2. The exemption of state agencies from natural taxation is limited to those of governmental character and does not extend to those used by the state in carrying on a private business.

3. The Constitution is a written instrument and, as such, its meaning does not change. Its language as a grant of power to the national government is general and as changes come in social and political life it embraces all new conditions within the scope of the powers conferred.

See 4 Rose's Supp. Notes of U. S. Reports.

In the South Carolina case the court had before it the consideration of a state dispensary system established by the state of South Carolina in 1895, primarily for reve-

nue, which was materially different from that presented in the instant case. **Under the South Carolina law, the dispensaries were operated by a dispenser licensed by a county board of control. Under the Ohio law, the state owned stores are operated by civil service employes of the state government.** In the instant case, instead of being concerned with a matter of taxing natural persons who were licensed by the state, we are here concerned with the matter of the taxation of the state itself. The two cases are clearly distinguishable.

It is pertinent to note that although this South Carolina case has since been cited by this court, it has been cited only as authority for the principle that a private business enterprise of the state, as distinguished from a governmental function, may be taxed by the federal government. In no single case has this court cited the South Carolina case as authority in support of the principle that the exercise of a state monopoly of the spirituous liquor business is a private business and not the performance of a governmental function. As hereinabove shown, whatever may have been the situation in 1905 as to this function being proprietary rather than governmental, at the present time it is strictly governmental.

CONCLUSION.

In conclusion, it is respectfully submitted that unless this court will permit this bill of complaint to be filed, the state is confronted with the arrest of over 187 of its officers and employes, the confiscation of its property of a

value of four and a half million dollars, and the necessity of litigating a multiplicity of actions in state and federal courts.

It is further submitted that in the operation of its department of liquor control the state is performing a function which has become purely governmental, made so by the adoption of the Twenty-first Amendment to the Constitution of the United States.

It is further submitted that the statutes of the United States do not impose a tax upon the state in the performance of its governmental functions and accordingly the threatened acts of defendants are unauthorized and may be enjoined

It is further submitted that the issue in this case, involving the question of whether in states having a liquor monopoly the traffic shall be considered as a traffic for revenue, will determine the fate of the most recent amendment of the federal Constitution upon the most vital and controversial question since slavery, and hence is a case of most unusual and exceptional aspects.

Wherefore, complainant's motion for leave to file a bill of complaint in this case should be granted and the immediately pressing question of the powers of the federal government and complainant as well as other states having adopted a state liquor monopoly adjudicated.

Respectfully submitted,

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APPENDIX.

Article III, Section 2, Constitution of the United States.

* * * * * * * * * * * * * * *

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. * * *

Article XVIII, Constitution of the United States.

After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

* * * * * * * * * * * * * * *

Article XXI, Constitution of the United States.

The Eighteenth Article of Amendment to the Constitution of the United States is hereby repealed.

The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Revised Statute 3140 (26 U. S. C. A., Sec. 11); Feb. 27, 1877, c. 69, § 1, 19 Stat., 248.

"State" and "person" defined. The word "state," when used in this title, shall be construed to include the territories and District of Columbia, where such construction is necessary to carry out its provisions. And where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word "person", as used in this title, shall be construed to mean and include a partnership, association, company or corporation, as well as a natural person.

Revised Statute 3232 (26 U. S. C. A., Sec. 181).

Trade or business prohibited until special tax paid. No person shall be engaged in or carry on any trade or business hereinafter mentioned until he has paid a special tax therefor in the manner hereinafter provided.

Revised Statute 3233 (26 U. S. C. A., Sec. 182).

Trade or business to be registered. Every person engaged in any trade or business on which a special tax is imposed by law shall register with the collector of the district his name or style, place of residence, trade or business, and the place where such trade or business is to be carried on. In case of a firm or company, the names of the several persons constituting the same, and their places of residence, shall be so registered.

Revised Statute 3235 (26 U. S. C. A., Sec. 184).

Payment of one tax covering several places of business. The payment of the special tax imposed shall not exempt from an additional special tax the person carry-

ing on a trade or business in any other place than that stated in the collector's register; but nothing herein contained shall require a special tax for the storage of goods, wares, or merchandise in other places than the place of business, nor, except as hereinafter provided, for the sale by manufacturers or producers of their own goods, wares, and merchandise, at the place of production or manufacture, and at their principal office or place of business, provided no goods, wares, or merchandise shall be kept except as samples at said office or place of business.

Revised Statute 3281 (26 U. S. C. A., Sec. 193); Feb. 8, 1875, c. 36, § 16, 18 Stat., 310.

Carrying on business without payment; forfeitures; rectifiers; wholesale liquor dealers, and so forth. Any person who shall carry on the business of a rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquors, retail dealer in malt liquors, or manufacturer of stills, without having paid the special tax as required by law, shall, for every such offense be fined not less than $100 nor more than $5000 and imprisoned not less than thirty days nor more than two years. And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such persons, wherever found, and all distilled spirits or wines and personal property found in the rectifying establishment, or in any building, room, yard, inclosures connected therewith, and used with or constituting a part of the premises shall be forfeited to the United States.

Revised Statute 3244 (26 U. S. C. A., Sec. 205); Feb. 8, 1875, c. 36, § 18, 18 Stat., 311; Feb. 18, 1875, c. 80, § 1, 18 Stat., 319; March 1, 1879, c. 125, §§ 4, 10, 20, Stat. 333, 342.

Special taxes; retail and wholesale liquor dealers; retail and wholesale dealers in malt liquors. (a) Retail liquor dealers. Retail dealers in liquor shall pay $25. Every person who sells or offers for sale foreign or domestic distilled spirits, wines or malt liquors otherwise than as hereinafter provided in less quantities than five wine gallons at the same time shall be regarded as a retail dealer in liquors.

(b) Wholesale liquor dealers. Wholesale liquor dealers shall each pay $100. Every person who sells, or offers for sale foreign or domestic distilled spirits, wines or malt liquors, otherwise than as hereinafter provided in quantities of not less than five wine gallons at the same time shall be regarded as a wholesale liquor dealer.

(c) Retail dealers in malt liquors. Retail dealers in malt liquors shall pay $20. Every person who sells or offers for sale malt liquors in less quantities than five gallons at one time, but who does not deal in spirituous liquors, shall be regarded as a retail dealer in malt liquors.

* * * * * * * * * * * * *

Revised Statute 3224 (26 U. S. C. A., Sec. 154).

Restraining assessments or collection of taxes. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.